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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

SYED ALI HUSAIN et al., Plaintiffs, Cross-defendants and Respondents, v. MCDONALD'S CORPORATION, et al., Defendants, Cross-complainants and Appellants.	A131235, A131689 (Marin County Super. Ct. No. CIV 096177)

McDonald's Corporation (McDonald's) and related parties appeal from orders granting a preliminary injunction to Syed Ali Husain and Khursheed Husain (the Husains) permitting the Husains to continue operating three McDonald's restaurants in Marin County pending completion of a trial in this action. We affirm the orders.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual Background*

Husain and his wife have owned McDonald's franchises since the early 1980's. By 2005, they held five McDonald's franchises in San Francisco and Daly City. In June 2005, the Husains entered into an agreement with third parties (the Magruders) to purchase an additional seven McDonald's restaurants in Marin County. The Magruders' franchise agreements with McDonald's required they obtain McDonald's consent to the transfer of ownership. In two separate assignment agreements between the Husains, the Magruders, and McDonald's, McDonald's consented to the Magruders' assignment of

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II.C. and II.D.

their franchise agreements to the Husains.[1] The dispute in this case centers on whether McDonald's made an enforceable promise to the Husains to extend or "rewrite" the franchise terms for three of the restaurants—Novato, Fourth Street, and Merrydale—either in the Assignment Agreement or otherwise.

When McDonald's opens a new restaurant or rewrites an existing franchise, it normally grants franchise rights for a 20-year term, absent lease tenure issues. However, the Corte Madera, Northgate, Novato, Fourth Street, Merrydale, and Mill Valley locations all had five years or less remaining in their franchise terms at the time of the Husains' purchase. Only the Hamilton franchise, not due to expire until 2019, had substantially more than five years left to run.[2]

The Husains assumed considerable financial obligations in connection with the purchase of the new locations. Pursuant to McDonald's borrowing guidelines, the Husains financed the purchase of the Marin franchises with a seven-year, $10.5 million note, refinanced in 2007 by a seven-year, $9.35 million note, which was secured by all of the fixtures and equipment at the Husains' existing and newly acquired restaurants. The loans also financed approximately $800,000 in renovations and other "reinvestment" at the Marin franchises which McDonald's required the Husains to complete by August 16, 2006 under the assignment agreements. The Husains acknowledged in the agreements

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[1] The assignment agreement primarily in issue involved six restaurants designated in the record as Novato, Fourth Street, Merrydale, Corte Madera, Northgate, and Hamilton (the Assignment Agreement). Because the Magruders held the franchise agreement for the seventh location, Mill Valley, in a different form of ownership, a second assignment agreement covering the Mill Valley location was necessary (the Mill Valley Assignment Agreement).

[2] Northgate, Corte Madera, Mill Valley, and Hamilton are not in dispute. The parties agree that McDonald's did promise to rewrite the Corte Madera and Mill Valley franchises. However, Corte Madera (and Northgate) closed before this suit was filed due to unrelated lease issues. McDonald's rewrote the Mill Valley franchise shortly after the Husains purchased it. The parties further agree McDonald's made no promise to rewrite the Hamilton franchise, which had a much longer term remaining when the Husains purchased it than any of the other Marin franchises.

timely completion of these reinvestments was a material term of the Magruder franchise agreements which they were assuming.

Paragraph 17 of the Assignment Agreement stated in relevant part as follows: "In consideration of McDonald's consent to this Assignment *and the issuance of a rewrite to Assignee*, Assignor waives, releases, and disclaims any claim for a rewrite of the franchise for the Corte Madera . . . location." (Italics added.) Paragraph 17 goes on to include a general release releasing McDonald's from any possible future claims by the Magruders, including claims arising from the Corte Madera franchise. The Husains contend paragraph 17 constitutes McDonald's promise to the Husains that it would rewrite the franchise agreements for all of the restaurants covered by the Assignment Agreement with the exception of the Hamilton location, which had more than 10 years remaining on its franchise. McDonald's contends the paragraph promises only that it would rewrite the Corte Madera franchise agreement since it had already denied the Magruders a rewrite for that franchise.[3]

There is no dispute McDonald's did offer the Husains new 20-year franchise terms in January 2006 for the Novato, Fourth Street, and Merrydale franchises under a program known as "Plan to Win." Under the program, after the sale of a franchise between existing McDonald's operators, a new 20-year franchise term would be offered to the purchaser if the remaining term for the acquired restaurant was less than 10 years and certain other criteria were met. The purchaser would have to agree to pay a prorated portion of the $45,000 initial franchise fee McDonald's charged for new 20-year franchise terms. In January 2006, Jodi Breen of McDonald's sent Husain three offer letters offering, respectively, to extend the terms on the Husains' Novato, Fourth Street, and Merrydale franchises to 2025. The offers required Husain to pay prorated initial franchise fees totaling approximately $119,000 for the three locations.

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[3] Under an identically worded paragraph 17 in the Mill Valley Assignment Agreement, McDonald's promised the Husains a rewrite of the Mill Valley franchise which it had previously denied to the Magruders.

McDonald's denied receiving any response from Husain to the offers. Breen testified she left a voicemail message for Husain after the deadline for responding to the offers had passed, but got no response. In March 2006, Breen sent Husain a letter confirming she had received no response to the offers and advising him the offers were no longer on the table. Husain denied receiving the March letter.

Husain contended he did timely accept the offers by mailing his signed acceptance from the Capuchino Station Post Office in Burlingame on January 21, 2006, and he submitted a copy of a post office "CERTIFICATE OF MAILING" to substantiate that contention. McDonald's presented evidence the Capuchino post office branch was closed on January 21, 2006 and called an expert to establish Husain could have easily fabricated the certificate of mailing.

As of the summer of 2006, the Husains had not begun the vast majority of the reinvestment work they were supposed to have completed by that time. However, according to a business review McDonald's completed in August 2006, the Husains' restaurants "[met] all of the National Franchising Standards and [were] eligible for growth and rewrite."

In 2006 and 2007, the Husains suffered business setbacks, including financial losses caused at least in part by a store manager's embezzlement from one of the San Francisco stores, which was not discovered until April 2008. According to the manager's confession to police, his embezzlement began in the fall of 2006 and was ongoing until he was tripped up after the installation of a new computer software program in 2008. The Husains began falling consistently behind in their payment of fees and rent to McDonald's beginning in December 2006, and also missed payments to the regional operators' cooperative (for coordinated advertising) and their primary food distributor. By the summer of 2007, the Husains owed McDonald's over $540,000 and the cooperative over $200,000. McDonald's threatened to terminate the Husains' franchises if these arrearages were not paid in full. In July 2007, Husain borrowed $450,000 on his home and brought himself current with McDonald's and the advertising cooperative. There were no further arrearages after that point.

Husain contended the 2007 financial issues took him by surprise and he attributed them primarily to the employee embezzlement that was discovered later.[4] He testified he believed at the time someone had hacked into his bank accounts. McDonald's offered evidence Husain was fully informed all along about the growing arrearages, and he was less than candid with McDonald's about the causes of the problem, telling the company falsely the bank was investigating the possible hacking of his McDonald's accounts. By all accounts, the parties' business relationship soured in 2007, and McDonald's began warning Husain it was not going to approve future rewrites of his franchises, pointing to his substantial arrearages in 2006 and his continued failure to complete agreed reinvestment work on his restaurants.

Unless rewritten by McDonald's, the franchise term for the Novato restaurant was due to expire on December 26, 2009. In 2008, the Husains had still not completed the agreed-upon reinvestment work on the Novato restaurant, including the enclosure of its restrooms. The McDonald's Rewrite Committee (Rewrite Committee) met on December 15, 2008 and voted not to offer the Husains a new franchise term for the Novato restaurant, citing the Husains' financial condition as reflected in their past failure to timely pay their debts to McDonald's, and their continuing failure to live up to their contractual reinvestment obligations, which McDonald's believed was having a negative impact on its brand image. A month before the final decision, McDonald's invited the Husains to submit any relevant information they wished to offer on the issue of the rewrite for the three franchises in issue. In response, Husain submitted a written narrative and a large packet of documents, and spoke at length with a McDonald's representative about the issue. He did not mention in any of his submissions or conversations either that he believed McDonald's had promised him new 20-year franchise agreements for the Marin restaurants as part of the Magruder transaction, or that he had signed and returned the Breen "Plan to Win" offer letters in January 2006.

[4] Husain's office manager estimated the store manager had embezzled approximately $108,000 between 2005 and 2008, but Husain testified the full amount was unknown and untraceable due to missing records.

Following the Rewrite Committee's decision, McDonald's urged the Husains to sell the three Marin franchises prior to their expiration dates. To facilitate the sale, McDonald's offered to grant new franchise terms for the restaurants to any approved purchasers. McDonald's contends this was consistent with the policy assertedly reflected in paragraph 17 of its two assignment agreements with the Husains that after denying an operator a rewrite for a franchise it would assist the operator in selling the franchise by agreeing to rewrite it for an approved purchaser.

B. *Injunction Proceedings*

The Husains advised McDonald's they did not intend to sell the stores, and filed this lawsuit in December 2009. The Husains sought injunctive relief to prevent McDonald's from removing them from the Novato restaurant on December 26, 2009, when their franchise expired. McDonald's cross-complained, and applied for a preliminary injunction requiring the Husains to surrender the restaurant.

The trial court set an evidentiary hearing on the competing motions, permitting the Husains to remain in the Novato restaurant in the interim. More than 10 days of evidentiary hearings were held in May, June, July, August, and September 2010. The trial court issued its written ruling on December 20, 2010, by which time the Husains' franchise agreements for Fourth Street and Merrydale had also expired. The court denied McDonald's motion, granted the Husains' motion, and issued a preliminary injunction requiring McDonald's to permit the Husains to continue operating the three restaurants in issue during the pendency of the suit. The court found paragraph 17 of the Assignment Agreement was ambiguous and susceptible to the meaning ascribed to it by the Husains, and that some of the extrinsic evidence supported the Husains' interpretation. The court also found the balance of harms resulting from an error in granting or denying interim injunctive relief weighed strongly in the Husains' favor.

McDonald's timely appealed from the court's December 20, 2010 ruling (case No. A131235) and from an ensuing order granting the Husains' preliminary injunction motion and denying McDonald's motion (case No. A131689).

II. DISCUSSION

McDonald's contends the trial court prejudicially erred in (1) granting injunctive relief to prevent the breach of a contract for personal services that, as a matter of law, cannot be specifically enforced; (2) finding the Husains had a likelihood of success on the merits of their contract claim; and (3) assessing the balance of harms to the two parties from erroneously granting or denying interim relief.

A. *Standard of Review*

In determining whether to issue a preliminary injunction, the trial court considers two related factors: (1) the likelihood the plaintiff will prevail on the merits of its case at trial, and (2) the interim harm the plaintiff is likely to sustain if the injunction is denied as compared to the harm the defendant is likely to suffer if the court grants a preliminary injunction. (*King v. Meese* (1987) 43 Cal.3d 1217, 1226.) "The latter factor involves consideration of such things as the inadequacy of other remedies, the degree of irreparable harm, and the necessity of preserving the status quo." (*Abrams v. St. John's Hospital & Health Center* (1994) 25 Cal.App.4th 628, 636.)

The scope of our inquiry on appeal from an order granting a preliminary injunction is narrow. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109.) The determination whether to grant a preliminary injunction generally rests in the sound discretion of the trial court. (*Abrams v. St. John's Hospital & Health Center*, *supra*, 25 Cal.App.4th at p. 636.) We do not interfere absent a clear showing the trial court's discretion has been abused. (*Brunzell Constr. Co. v. Harrah's Club* (1967) 253 Cal.App.2d 764, 773–774.)

"Discretion is abused when a court exceeds the bounds of reason or contravenes *uncontradicted* evidence." (*Jessen v. Keystone Savings & Loan Assn.* (1983) 142 Cal.App.3d 454, 458, italics added.) "In determining the validity of [an] injunction, we look at the evidence presented to the trial court to determine if there was substantial support for the trial court's determination that the plaintiff was entitled to the relief granted. If there is, then the trial court properly exercised its discretion. *Where the evidence is conflicting, we do not reweigh it . . . .*" (*Monogram Industries, Inc. v. Sar

Industries, Inc. (1976) 64 Cal.App.3d 692, 703, italics added.) However, to the extent the ruling presents an issue of pure law not presenting factual issues, we review the determination de novo. (See *Efstratis v. First Northern Bank* (1997) 59 Cal.App.4th 667, 671–672.)

B. *Specific Performance of Franchise Agreements*

Relying principally on *Woolley v. Embassy Suites, Inc.* (1991) 227 Cal.App.3d 1520 (*Woolley*), McDonald's argues its franchise agreements with restaurant operators are, in essence, contracts for the personal services of the franchisee not subject, as a matter of law, to the remedy of specific enforcement by either party in the event of a breach. It emphasizes language in its franchise agreements to the effect that the maintenance of a "close personal working relationship" with McDonald's is "the essence" of the franchise.

The plaintiffs in *Woolley* owned 22 hotels throughout the U.S. that were franchised to Embassy Suites (Embassy). (*Woolley, supra,* 227 Cal.App.3d at p. 1525.) Embassy also managed 17 of the hotels for the plaintiffs under 17 individual management agreements pursuant to which the owner had the right to terminate the manager on certain conditions. (*Ibid.*) The plaintiffs filed suit against Embassy, alleging material breach of the management agreements and seeking, among other things, a judicial declaration the agreements could be terminated. (*Ibid.*) Embassy sought and obtained a preliminary injunction enjoining the plaintiffs from terminating or attempting to terminate any of the management agreements, and the plaintiffs appealed. (*Id.* at pp. 1525–1526.) There was no dispute regarding the Embassy franchise agreements. (*Id.* at p. 1525, fn. 1.)

The Court of Appeal reversed the preliminary injunction order on several grounds, including the principle that an injunction cannot be granted to prevent the breach of a personal services contract. (*Woolley, supra,* 227 Cal.App.3d at pp. 1526–1535.) The court found the management agreements at issue called for the " 'rendition of a performance that is of a distinctly personal and non-delegable character . . . . [in the same category as] the contracts of actors and artists, managers, sales agents, school-teachers, mechanics, cooks, and contracts for the furnishing of personal care and support.' " (*Id.* at

p. 1534, quoting 5A Corbin, *Contracts* (1964) § 1204 at p. 398, italics omitted; see also Civ. Code, § 3390 [obligations to render personal service or employ another in personal service cannot be specifically enforced].) The appellate court reasoned the management agreements entrusted Embassy with such wide-ranging, complex, discretionary decisionmaking, and required such special skill and judgment on Embassy's part, they could only be considered contracts for the rendition of personal service by Embassy: "The manager's duties include: hiring and firing managerial personnel and hundreds of other employees, contracting for utility services, landscaping, maintenance and security, processing reservations, arranging for advertising and promotion, and filing legal actions on the owner's behalf to collect rent charges, cancel leases or dispossess guests. In other words, the contracts call for a series of complex and delicate business decisions and require mutual cooperation and trust, both of which have ceased to exist in the wake of rancorous litigation between the parties." (*Woolley*, at p. 1534.)

In our view, *Woolley* is distinguishable. The court in *Woolley* emphasized the discretionary nature of the decisionmaking authority held by Embassy and the complexity and delicacy of the business decisions entrusted to it. It found the services required to be as " 'distinctly personal and non-delegable' " as the services of an actor or artist. (*Woolley, supra*, 227 Cal.App.3d at p. 1534.) In other words, the court found the contract in issue was for "personal services" because management of the hotels *by Embassy and no other* was central to the contract. The Husains' franchise and licensing agreements with McDonald's were of a completely different and opposite character.

The form license agreement between McDonald's and the Husains for the Novato restaurant explains the essence of the "McDonald's System" is to ensure comprehensive control by McDonald's over every material aspect of the restaurant's operations so the uniformity of the McDonald's customer experience could be assured in every one of its locations: "The McDonald's System is a comprehensive restaurant system for the retailing of a limited menu of uniform and quality food products, emphasizing prompt and courteous service in a clean, wholesome atmosphere . . . . The foundation of the McDonald's System and *the essence of this License is adherence by Licensee to* *standards and policies of Licensor providing for the uniform operation of all McDonald's restaurants . . . including, but not limited to, serving only designated food and beverage products; the use of only prescribed equipment and building layout and designs; strict adherence to designated food and beverage specifications and to Licensor's prescribed standards of Quality, Service and Cleanliness* . . . ." (Italics added.) The license agreement requires the Husains to comply with all business policies, practices, and procedures imposed by McDonald's, serve only those food and beverage products McDonald's designates, maintain the building, equipment, and parking area in compliance with standards designated by McDonald's, and purchase fixtures, lighting and other equipment, seating, and signs in accordance with McDonald's designated standards. McDonald's also dictates the restaurant hours, the uniforms worn by employees, all containers and paper products used, and all food and beverage flavorings and ingredients.

In *In re Sunrise Restaurants, Inc.* (Bankr. M.D.Fla. 1991) 135 B.R. 149, the court analyzed whether a form of franchise agreement indistinguishable from that used by McDonald's was a "personal service" contract. In that case, a bankruptcy debtor who owned four Burger King restaurants sought to sell the restaurants and associated franchise agreements, along with other assets, in order to pay off creditors. (*Id.* at p. 150.) Burger King opposed the sale and contended its franchise agreements with the debtor could not be assigned under the Bankruptcy Code because they were contracts for personal services. (*In re Sunrise Restaurants, Inc.*, at pp. 152–153.) The court rejected Burger King's position: "There is hardly any question that [the] relationship between parties was nothing more than a strict business transaction to furnish economic gains to both contracting parties. To run a Burger King retail establishment does not require a special knowledge in a conventional sense, that is a special judgment, taste, skill or ability. The entire franchise operation is based on the strict rules and conditions imposed by the contract, and no retail operator is permitted to utilize his own independent culinary skills to cook hamburgers or to serve any other food items which are not generally served in Burger King establishments according to their standard. This being the case, the objection by [Burger King] [to] the Debtor's right to assume or assign the franchise agreements and other contractual rights is without merit and must be rejected." (*Id.* at p. 153.)

Applying California law, the court in *In re Health Plan of the Redwoods* (Bankr. N.D.Cal. 2002) 286 B.R. 407 (*Health Plan*), found a physician group's contract with a bankrupt HMO to provide medical services to its members was not a personal service contract under California law because it did not involve a personal relation of confidence between the parties or rely on the character and personal ability of a party— a test it derived from *Coykendall v. Jackson* (1936) 17 Cal.App.2d 729. (*Health Plan*, at p. 409.) "In order to be considered a personal service contract, there must be a special relationship between the parties or the party to perform must possess special knowledge or a unique skill, *such that no performance save that of the contracting party could . . . meet the obligations of the contract*." (*Ibid.*, italics added.) The court stated: "While a contract for a physician's services might have been considered ipso facto a personal service contract 50 or 100 years ago, everything about these contracts and the nature of modern medical care militates against a finding that the contracts in question here are personal service contracts. Absolutely nothing . . . supports a finding that the contracts or the services to be rendered under them are sui generis. All of the physician contracts are essentially identical, and do not require the physicians to perform personally. They only require that the physician provide services to members, and require physicians to make 'arrangements to assure care of his/her Member patients after hours or when Physician is otherwise absent, consistent with Health Plan's administrative requirements.' " (*Id.* at pp. 409–410.)

A "close personal working relationship" does not automatically equate to personal services as defined by law. That depends on the nature and substance of the relationship. Here, the Husains are not providing personal services *to McDonald's* except in the limited sense that they are expected to work in the business rather than be passive investors. Although they *are* providing their services *to McDonald's customers*, they do so in a manner McDonald's strictly controls. From the perspective of McDonald's, the

Husains are primarily providing a flow of income to the corporation. That is wholly unlike the management agreement at issue in *Woolley*. The plaintiffs in *Woolley* paid Embassy consideration to make a myriad of complex managerial decisions directly impacting the value of and return on the plaintiffs' very sizeable hotel investments. Here, McDonald's is not paying the Husains in order to benefit from their special skills, taste, or managerial judgment, but has granted them a franchise based on their willingness and ability to faithfully carry out the McDonald's System and secure for McDonald's the target flow of revenues it expects to achieve from the franchised locations. McDonald's relies on its right to control the Husains' performance, not on their special tastes or abilities.[5]

McDonald's tacitly acknowledges its franchise agreements are not personal service contracts by arguing in another context that there is a "very robust market" for the sale of McDonald's franchises, and the Husains could have easily sold the franchises to an approved purchaser just as the Magruders had done. In that light, and considering that all of McDonald's franchise and licensing agreements with its many thousands of franchisees are standardized, and comprehensively dictate the terms of each franchisee's performance, it can hardly be said "no performance save that of [the Husains] could meet the obligations of the contract." (*Health Plan, supra*, 286 B.R. at p. 409.)

We recognize some cases applying Florida law as set forth in *Burger Chef Systems, Inc. v. Burger Chef of Fla., Inc.* (Fla.Dist.Ct.App. 1975) 317 So.2d 795 (*Burger Chef*) have held franchise agreements are not subject to specific performance as a matter of law. (See e.g., *Burger King Corp. v. E-Z Eating 8th Corp.* (S.D.Fla. Feb. 11, 2008,

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[5] *Thayer Plymouth Center, Inc. v. Chrysler Motors Corp.* (1967) 255 Cal.App.2d 300, also relied upon by McDonald's, is similarly unpersuasive. According to Witkin, *Thayer* exemplifies the "archaic doctrine" that contracts requiring court supervision must be denied specific performance, which has been superseded by modern case law recognizing that specific performance is available whenever it is practically feasible. (13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 45, p. 337; accord, *GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 880.) *Long Beach Drug Co. v. United Drug Co.* (1939) 13 Cal.2d 158, also cited by McDonald's, is rooted in the same archaic principle. (*Id.* at p. 171.)

Civ. No. 07-20181-CIV) 2008 WL 384554; *Burger King Corp. v. Weaver* (S.D.Fla. 1992) 798 F.Supp. 684.) However the seminal decision, *Burger Chef*, involved a permanent injunction, not an interim injunction pendente lite. (317 So.2d at p. 796.) The *Burger Chef* court did not suggest the same rule would apply to interim injunctive relief and, in fact, cited with apparent favor two decisions upholding temporary injunctions against the termination of franchises until the merits of the dispute could be decided. (*Id.* at p. 797, fn. 2, citing *Bateman v. Ford Motor Company* (3d Cir. 1962) 302 F.2d 63 and *Semmes Motors, Inc. v. Ford Motor Company* (2d Cir. 1970) 429 F.2d 1197.) In any event, we do not find *Burger Chef* and the cases relying on it persuasive. The *Burger Chef* opinion is devoid of any analysis supporting its per se rule that no contract involving an element of personal service, including franchise agreements, can be subject to specific performance.[6]

We therefore reject McDonald's contention that the injunction violates California law and policy regarding the availability of specific performance.

C. *Likelihood of Success on the Merits*

The trial court concluded the Husains had met their burden of showing a reasonable probability of success on the merits of their claim that paragraph 17 of the Assignment Agreement promised them rewrites of the Novato, Merrydale, and Fourth Street franchise agreements. McDonald's disputes this. Viewing the facts in the light most favorable to the Husains and indulging all reasonable inferences in favor of the trial court's order, we must determine if any substantial evidence in the record supports the trial court's finding. (*Gleaves v. Waters* (1985) 175 Cal.App.3d 413, 416–417.)

The trial court found extrinsic evidence would be admissible at trial to construe whether paragraph 17 constituted a promise by McDonald's to rewrite all five franchises subject to the Assignment Agreement that would be expiring within a few years, or merely a promise to rewrite the Corte Madera franchise. The court further determined

[6] We also note that *Burger Chef* involved a dealership agreement for the distribution of Burger King equipment and supplies, not a restaurant franchise agreement. (*Burger Chef*, *supra*, 317 So.2d at p. 797, fn. 1.)

(1) there was disputed extrinsic evidence relevant to proving the parties' conflicting contractual interpretations; and (2) under *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375 (*City of Hope*), a reasonable jury could interpret the Assignment Agreement either in the limited manner McDonald's proposed or the more expansive manner propounded by the Husains.[7]

McDonald's contends as an initial matter the trial court should not have considered extrinsic evidence at all because the Assignment Agreement's language is "perfectly clear" on its face. But as McDonald's acknowledges, the test of whether parol evidence is admissible to construe an ambiguity is not whether the language appears to the court to be unambiguous, but whether the evidence offered is relevant to prove a meaning to which the language is reasonably susceptible: " 'Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning. . . .' [¶] . . . 'If in light of the extrinsic evidence the court decides the language is "reasonably susceptible" to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract. [Citation.]' [Citation.] The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. [Citation.] The trial court's resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict,

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[7] The Supreme Court explained the role of juries in interpreting contracts as follows in *City of Hope*: "Juries are not prohibited from interpreting contracts. Interpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or when a determination was made based on incompetent evidence. [Citations.] But *when . . . ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury* [citation]." (*City of Hope, supra,* 43 Cal.4th at p. 395, italics added, fn. omitted.)

the trial court's resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence." (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1350–1351, fn. omitted.)

The Husains argue the following evidence supports their interpretation of the contract: Mr. Husain testified Derrick Pratt (vice-president and general manager of McDonald's Pacific Sierra region)—who negotiated the conditions of the Assignment Agreement with Husain and ultimately approved the sale—specifically advised him any franchise Husain acquired with less than a 10-year remaining term *would* be renewed and Pratt was approving him for new 20-year terms. Husain testified he would never have purchased the Marin franchises and would not have paid $10 million for them if he thought the short-term franchises were not going to be rewritten. Husain was not represented by an attorney in the negotiations with Pratt because he trusted McDonald's. McDonald's drafted the Assignment Agreement and Husain had no input into it. Husain also produced evidence that when he was considering selling one of his restaurants in 2001, Pratt's predecessor had sent him a letter stating it was McDonald's rewrite policy that "if you sell/transfer the Restaurant prior to the [franchise] expiration date, the purchaser will be given a new term franchise consistent with our real estate tenure."[8]

John Kujawa (McDonald's vice-president of national franchising) testified it was McDonald's policy starting in 2005 or 2006 to offer new franchise terms to existing operators who purchased restaurants from other operators with less than 10 years remaining on the term, if certain conditions were met and the restaurant qualified. Kujawa further testified the Magruder-Husain transaction qualified under that policy.[9] Moreover, Kujawa acknowledged McDonald's signed off on the financial viability of the

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[8] The 2001 letter also stated that Husain had rejected McDonald's offer to rewrite the franchise term for the restaurant in question making the statement of rewrite policy consistent with McDonald's claim that it offers rewrites to purchasers only if the term is about to expire and the seller has already been denied a rewrite.

[9] Kujawa also testified that new terms were in fact *offered* to Husain pursuant to that policy, and would have been granted if he had fulfilled the conditions set forth in the offer letters as well as the reinvestment conditions in the Assignment Agreement.

transaction before agreeing to the assignment. It may reasonably be inferred (as the court did infer) McDonald's knew or should have known the franchises needed an extended term to provide the Husains with a return on their $10.5 million investment.

Thus, there is substantial evidence in the record that (1) McDonald's had a general policy of providing new 20-year terms to franchise purchasers to facilitate the sale of franchises, (2) this policy was communicated to Husain previously and he was aware of it in 2005, (3) McDonald's specifically assured Husain in 2005 he would get a rewrite of the Marin franchises with a remaining term of less than 10 years, (4) McDonald's and Husain understood the Husains' investment was premised on new franchise terms for those restaurants, and (5) McDonald's drafted the Assignment Agreement and was in the best position to make the scope of its obligations to the Husains clear.[10]

Is paragraph 17 of the Assignment Agreement reasonably susceptible to the interpretation that it promised the Husains a rewrite of the five Marin franchises with less than 10 years remaining in their terms? The paragraph states in relevant part: "In consideration of McDonald's consent to this Assignment *and the issuance of a rewrite to Assignee,* Assignor waives, releases, and disclaims any claim for a rewrite of the franchise for the Corte Madera . . . location." (Italics added.) The term "rewrite" is not defined in the agreement. Paragraph 17 was part of an agreement entitled, "ASSIGNMENT AND CONSENT TO ASSIGNMENT OF FRANCHISE TO AN INDIVIDUAL PURCHASER," that expressly defined the singular words "Franchise" and "Restaurant" to refer collectively to all six franchise agreements and restaurants, respectively, that were covered by the agreement. Thus, when paragraph 17 promises "the issuance of a rewrite to Assignee," it is far from clear "a rewrite" refers solely to the

[10] *City of Hope* upheld an instruction to the jury that in cases where uncertainty in construing contract language remains after considering the evidence and applying other rules of contract construction it should interpret the contract " 'most strongly against the party who caused the uncertainty to exist.' " (*City of Hope, supra,* 43 Cal.4th at pp. 397–398, citing Civ. Code, § 1654 ["In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist"].)

issuance of a rewrite *for the Corte Madera restaurant*. If that was McDonald's intention, it would have been easy to make the intention clear by inserting the words "of the Corte Madera franchise" after "rewrite" in the operative sentence or by defining the term "rewrite" to limit it to Corte Madera. But, as drafted, we agree with the trial court the sentence is ambiguous as to whether "a rewrite" refers to a rewrite of the Corte Madera franchise or a rewrite of all of the soon-to-expire franchises. Unless the weight and credibility of the extrinsic evidence as evaluated by the fact finder supports its resolution in McDonald's favor, the ambiguity will support the Husains' position. (*City of Hope*, *supra*, 43 Cal.4th at pp. 397–398.)

McDonald's claims the Assignment Agreement is not ambiguous in the respect claimed because paragraph 22 of the agreement disclaims any offer of a new franchise, and specifies no such franchise or offer could come into existence without a separate writing signed by McDonald's. Paragraph 22 states: "No future franchise or offer of franchises for additional McDonald's restaurants has been promised to Assignee and no such franchise or franchise offer will come into existence, except by means of a separate writing . . . ." However, McDonald's does not dispute that paragraph 17 did expressly promise a new franchise for the Corte Madera restaurant. If paragraph 22 is not inconsistent with that promise, there is no reason to suppose it would be inconsistent with a promise of rewrites for other locations. Moreover, by its own terms, paragraph 22 addresses *future* franchises for *additional* McDonald's restaurants. The language McDonald's relies on is arguably silent about any offer of franchises for the six *existing* restaurants addressed in the Assignment Agreement. We find no language in paragraph 22 (or elsewhere within the Assignment Agreement) that settles the ambiguity in paragraph 17.

We also reject McDonald's contention that contract integration language found in paragraph 22 ("The Franchise and this Assignment constitute the entire agreement between the parties and contain all of the terms, conditions, rights, and obligations of the parties with respect to the Restaurant and the Franchise") precludes the consideration of any extrinsic evidence.[11] The presence of an integration clause does not preclude the consideration of extrinsic evidence to explain what the parties meant by the language they used *in* the written contract. (*Software Design & Application, Ltd. v. Price Waterhouse* (1996) 49 Cal.App.4th 464, 470; *Aragon-Haas v. Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232, 240.) The trial court correctly found extrinsic evidence is admissible for that purpose.

McDonald's also calls our attention to its own extrinsic evidence which, if credited by the fact finder, would tend to negate Husain's contract interpretation claim. Thus, McDonald's witnesses explained that after McDonald's denies a franchisee a rewrite it normally wants to facilitate the sale of the franchise to a qualified operator and therefore offers a rewrite to prospective purchasers. It had denied the Magruders rewrites for the Corte Madera and Mill Valley franchises and the sole intention of paragraph 17 in the two assignment agreements was to provide rewrites to the Husains for these two locations to facilitate the sale so McDonald's did not have to give up the locations or operate them itself. Regarding Derrick Pratt's representations to Husain in 2005 that the Marin franchises would be rewritten, McDonald's argues these were consistent with the "Plan to Win" program under which rewrite offers were made to (and allegedly ignored by) Husain in 2006, and had nothing to do with Husain's asserted rights under paragraph 17 of the Assignment Agreement. Most importantly, McDonald's cites the fact that notwithstanding the parties' extensive communications about the rewrites in issue, dating back to 2007 or 2008, the Husains never made the paragraph 17 argument they are making now until after this litigation arose. McDonald's argues this evidence of the Husains' "contemporaneous conduct" before any litigation arose is the strongest evidence of the parties' intent with regard to paragraph 17.

But the foregoing arguments establish, at most, that the extrinsic evidence bearing on the interpretation of paragraph 17 is in conflict. The issue before us is whether any

[11] Paragraph 22 also states in substance that no oral statements could create rights different from or supplementary to the rights set forth in the Assignment Agreement and the relevant franchise agreements.

substantial evidence supports the trial court's determination the Husains have a reasonable likelihood of prevailing. In the preliminary injunction context, "[a]rguments which reweigh the evidence before the superior court are irrelevant. Where, as here, there is evidence which supports the trial court's determination, it is of no import that there is [also] evidence which conflicts with it." (*American Academy of Pediatrics v. Van de Kamp* (1989) 214 Cal.App.3d 831, 839.)

For these reasons, we reject McDonald's claim the trial court erred in finding the Husains had a likelihood of success on the merits. Because our standard of review is highly deferential, we emphasize that our decision implies no judgment or prediction that the Husains are in fact likely to prevail in a trial on the merits. We do not determine the merits of the case in advance of trial. (*O'Shea v. Tile Layers Union* (1957) 155 Cal.App.2d 373, 378.) Nor is the trial court's order granting preliminary relief a final determination. Its order reflects nothing more than the trial court's evaluation of the controversy on the record before it at the time of its ruling rather than an adjudication of the ultimate merits of the dispute. (*People ex rel. Gallo v. Acuna*, *supra*, 14 Cal.4th at p. 1109.)

D. *Irreparable Harm*

The trial court found the balance of harms tipped strongly in the Husains' favor. The court cited evidence the Husains would have a substantially negative cash flow if they lost the Marin restaurants in issue, taking their personal debt into account. Husain testified losing the restaurants would deprive the business of the substantial economic advantages in being able to move employees, managers, and food supplies back and forth among the Marin locations, and of being able to service them with a centralized maintenance facility. In his view, the value of the restaurants was in owning them as a group, not as individual units. The court also pointed out Husain had agreed to technology upgrades and reinvestments for the remaining restaurants that might require him to invest upwards of $500,000 more per store. In the court's view, the loss of the three stores would have jeopardized the Husains' other franchise and their ability to remain in the business they have operated for the last 30 years. The court judged the potential harm to the Husains to be "serious and possibly catastrophic."

At the same time, the court found little risk of harm to McDonald's. The Husains continued to operate the restaurants and stay current in their payments to McDonald's. There was no testimony establishing any deterioration of restaurant quality or a threat of McDonald's ability to protect its trademarks and goodwill. The court noted the Husains had "a long history of support for and protection of the McDonald's franchise," and "it [was] not in Husain's self-interest to do anything that would do harm to the brand that provides the income necessary to service his loans and sustain his family's business." The court also observed McDonald's would most likely continue being in business with the Husains in San Francisco whether or not an injunction was granted in Marin.

McDonald's contends that *as a matter of law* the Husains' alleged harm is not irreparable because it involves money damages only. McDonald's cites a series of cases standing for the proposition a loss of sales or income alone is not irreparable injury. (See, e.g., *Blind Doctor Inc. v. Hunter Douglas, Inc.* (N.D.Cal. Sept. 7, 2004, No. C-04-2678 MHP) 2004 WL 1976562, *9 [manufacturer's refusal to supply products]; *Aurora World, Inc. v. Ty Inc.* (2009) 719 F.Supp.2d 1115, 1169 [trademark infringement].) That principle applies equally in the franchise context. (See, e.g., *Jay Bharat Developers, Inc. v. Minidis* (2008) 167 Cal.App.4th 437, 447 [because franchisor proved interim harm it would suffer was more than monetary, injunctive relief against subfranchisor was appropriate]; *Truglia v. KFC Corp.* (S.D.N.Y. 1988) 692 F.Supp. 271, 279 (*Truglia*) [loss of eight-month-old restaurant franchise not irreparable harm].)

However, as the *Truglia* case illustrates, there is no per se rule that the loss of a franchise can never constitute irreparable harm. The court stated: "It has been held that the loss of goodwill involving the termination of a franchise or distributorship can constitute the sort of irreparable harm which will justify the imposition of a preliminary injunction. See, e.g., *Jacobson & Co., Inc. v. Armstrong Cork Co.*, 548 F.2d 438 (2d Cir. 1977) (movant who had been in business for over eight years, and who stood to lose goodwill and present and potential customers if he lost the right to distribute the defendant's products, showed an immeasurable harm not compensable in money). *The loss or destruction of an entire business has also widely been held to constitute irreparable harm, at least when the business has been in operation for some time*. E.g., *Roso-Lino Beverage Distributors, Inc. v. The Coca-Cola Bottling Co.*, 749 F.2d 124 (2d Cir. 1984) (loss of a distributorship representing eleven years of effort by a wife and husband constituted irreparable harm); *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970) (right to continue a twenty-year old business not measurable entirely in monetary terms); *Newport Tire & Rubber Co. v. The Tire & Battery Corp.*, 504 F.Supp. 143 (E.D.N.Y. 1980) (reviewing Second Circuit authorities)." (*Truglia, supra*, 692 F.Supp. at p. 279, italics added.) California law is to the same effect. (*Dingley v. Buckner* (1909) 11 Cal.App. 181, 183 ["No proceeding at law can afford an adequate remedy for the destruction of one's business"]; *Greenfield v. Bd. of City Plan. Commrs.* (1935) 6 Cal.App.2d 515, 519 ["destruction of one's business is manifestly an irreparable injury"].)

McDonald's also contends the Husains' alleged financial hardship was unsubstantiated, citing testimony it proffered that the Husains' income from the three franchises comprises only a small part of their monthly cash flow. This merely establishes a conflict in the evidence which falls short of meeting McDonald's burden of demonstrating trial court error or abuse of discretion. (*American Academy of Pediatrics v. Van de Kamp, supra*, 214 Cal.App.3d at p. 839.) McDonald's further claims the threatened injury to the Husains could have been avoided if the Husains had sold the franchises, as McDonald's urged them to do, and used the proceeds to pay down their debt. This is a highly speculative scenario, however, and McDonald's fails to cite any evidence in the record, much less undisputed evidence, establishing the Husains could have fully recovered their investment, avoided defaulting on their debt, and prevented the potential destruction of their 30-year-old business by following this path.

Finally, McDonald's claims the injunction will cause it irreparable harm as a matter of law due to the asserted "loss of control" of its trademarks, even if the Husains' restaurants are not presently violating any of its quality control standards. However, the case law establishes franchisors are not automatically entitled to enjoin the continued use of their trademarks when disputes arise over the termination of a franchise. At a minimum, McDonald's must prove it is likely to prevail on the question of whether the termination was proper before such relief could be given. (See *McDonald's Corp. v. Robertson* (11th Cir. 1998) 147 F.3d 1301, 1308 [franchisor must show it properly terminated the contract authorizing the trademarks' use]; *Tsunami Softgoods, Inc. v. Tsunami International, Inc.* (D.Utah 2001) 2001 WL 670926, *4 [rejecting trademark licensor's argument its entitlement to injunctive relief against trademark use existed independently of any contractual dispute between the parties, and noting only a small minority of jurisdictions follow a contrary rule].) Here, the court did not find McDonald's was likely to prevail. While a franchisee in a franchise termination dispute cannot stop paying franchise fees or otherwise cease performance under the franchise agreement, a franchisee who maintains performance and otherwise qualifies for injunctive relief will not be denied relief as a matter of law based on a bare claim of unauthorized trademark use. (See *Jay Bharat Developers, Inc. v. Minidis*, *supra*, 167 Cal.App.4th at pp. 443–444 [subfranchisor not entitled to cease paying royalty and advertising fees yet continue to use RedBrick Pizza franchise and trademarks].)

We find no error and no abuse of discretion in the trial court's consideration of the balance of harms to the parties.

III. DISPOSITION

The trial court's December 20, 2010 and February 16, 2011 orders are affirmed.

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Margulies, J.

We concur:

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Marchiano, P.J.

____
Dondero, J.

Trial Court: Marin County Superior Court

Trial Judge: Hon. James R. Ritchie

Counsel:

Kirkland & Ellis, Christopher Keegan and Jonathan C. Bunge for Defendants, Cross-complainants and Appellants.

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